Selvarajoo a/l Palaniappa Pillai v Paramasivam a/l Palaniappa Pillai

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-504–04 OF 2012
PRASAD ABRAHAM J
17 MAY 2013

Succession — Probate — Grant of probate — Plaintiff challenged veracity of will after defendant obtained grant of probate — Whether plaintiff had locus standi to commence action — Presumption of marriage — Whether deceased and plaintiff's mother were married — Whether plaintiff legitimate son of deceased — Testamentary capacity — Whether deceased had testamentary capacity to execute will — Whether plaintiff raised suspicious circumstances that cast doubt on testamentary capacity of deceased

In the late 1940s the late Palaniappa Pillai s/o Periayah ('the deceased') came to this country from India and lived in a house in Rawang, Selangor ('the family home') with his two wives, Veeramah and Sinnamal, who were both sisters. The deceased had four chidren with Veeramah, namely the plaintiff and his three brothers. The deceased was also reputed to have two wives in India, who were allegedly dead. The defendant and his brother claimed to be his children by his first wife. Upon the death of the deceased, the defendant obtained a grant of probate based on the last will and testament of the deceased ('the will'). The plaintiff challenged the veracity of the will. The plaintiff contended that the will could not have been executed by the deceased as he was seriously ill at the material time. The plaintiff filed the present suit challenging the will propounded by the defendant. The defendant, in turn counterclaimed by challenging the locus of the plaintiff to bring this action on the grounds that the law of distribution did not recognise the plaintiff as his birth status was illegitimate. According to the defendant, the deceased had not entered into a customary marriage with the plaintiff's mother, Veeramah, and that Veeramah had in fact entered into a customary marriage with another. However, the plaintiff maintained that he was the lawful son of the deceased. The plaintiff submitted that the deceased, his two wives, the plaintiff and his brothers as well as the defendant and his brother had lived together in the family home and were regarded by all and sundry as one family.

Held, making an order in favour of the plaintiff and dismissing the defendant's counterclaim with no order as to costs:

(1) Although there was no clear direct evidence of Veeramah and the deceased having entered into a ceremony of marriage, the presumption of marriage was not be so easily repelled because the evidence pointed to the

deceased and Veeramah being regarded as and passing off as husband and wife for almost forty years. Further the plaintiff and his siblings as well as the defendant and his brother were brought up in the family home (see para 5(a)).

(2) The evidence adduced in the present case, such as the plaintiff's birth certificate that clearly cited the deceased as his father; the fact that Veeramah participated in the funeral rites of the deceased when he passed away; and the plaintiff's brother's wedding invitation that was issued in the name of Veeramah and the deceased supported the presumption of a valid marriage between Veeramah and the deceased. Further, the conduct of the defendant in allowing the plaintiff and the family to continue to reside in the family home and act of transferring properties to the plaintiff was indicative of conduct moved by family ties (see para 5(b) – (e)).

(3) The power to remove in law the status of legitimacy of the plaintiff and the reality that the same blood runs through the veins of the plaintiff and the defendant should be exercised only in the most drastic of cases. The present case was not one in which the power should be exercised. As such, the plaintiff was the legitimate son of the deceased (see para 7).

(4) Although the defendant argued that the deceased had only suffered a minor stroke and was in full control of his mental faculties when he executed the will, the medical evidence suggested that the deceased had made little recovery and was very weak and incoherent. In the circumstances it was difficult to comprehend how the deceased could have visited the lawyer's office to prepare the said will. The attesting witnesses to the will were also not called to testify (see para 10).

(5) The plaintiff had succeeded in raising several suspicious circumstances that cast doubt on the testamentary capacity of the deceased when he executed the will (see para 11).

[Bahasa Malaysia summary

Pada akhir tahun 1940-an, mendiang Palaniappa Pillai a/l Periayah ('si mati') datang ke negara ini dari India dan tinggal di sebuah rumah di Rawang, Selangor ('rumah keluarga tersebut') dengan dua orang isterinya, Veeramah dan Sinnamal, yang kedua-duanya adik-beradik. Si mati mempunyai empat orang anak dengan Veeramah, iaitu plaintif dan tiga orang saudara lelakinya. Si mati juga dikatakan mempunyai dua orang lagi isteri di India, yang didakwa sudah meninggal dunia. Defendan dan saudara lelakinya mendakwa diri mereka sebagai anak isteri pertama. Dengan kematian si mati, defendan mendapat geran probet berdasarkan wasiat terakhir si mati ('wasiat'). Plaintif mencabar kebenaran wasiat tersebut. Plaintif menghujahkan bahawa wasiat tersebut tidak mungkin dilaksanakan oleh si mati kerana dia sakit tenat pada masa material. Plaintif memfailkan guaman ini mencabar wasiat yang dikemukakan oleh defendan. Defendan sebaliknya menuntut balas dengan

mencabar lokus plaintif untuk membawa tindakan ini atas alasan bahawa undang-undang pembahagian tidak mengiktiraf plaintif kerana status kelahirannya adalah tidak sah. Menurut defendan, si mati tidak berkahwin secara adat dengan ibu plaintif, Veeramah dan malahan Veeramah telah berkahwin secara adat dengan orang lain. Walau bagaimanapun, plaintif menghujahkan bahawa dia adalah anak lelaki si mati yang sah. Plaintif menghujahkan bahawa si mati, kedua-dua isterinya, plaintif dan saudara-saudara lelakinya serta defendan dan saudara lelakinya tinggal di rumah keluarga tersebut dan dianggap oleh ramai sebagai satu keluarga.

Diputuskan, perintah memihak plaintif dan menolak tuntutan balas defendan tanpa perintah terhadap kos:

(1) Walaupun tiada keterangan langsung bahawa Veeramah dan si mati telah berkahwin secara adat, anggapan perkahwinan tidak boleh ditolak dengan mudah kerana keterangan menunjukkan bahawa si mati dan Veeramah dianggap dan dilihat sebagai suami dan isteri selama hampir 40 tahun. Tambahan lagi, plaintif dan adik-beradiknya dan juga defendan serta saudara lelakinya dibesarkan di rumah keluarga tersebut (lihat perenggan 5(a)).

(2) Keterangan yang dikemukakan dalam kes ini, seperti sijil kelahiran plaintif jelas menyatakan si mati sebagai ayahnya; fakta bahawa Veeramah terlibat dalam acara pengebumian si mati ketika dia meninggal dunia; dan undangan perkahwinan saudara lelaki plaintif yang dikeluarkan di bawah nama Veeramah dan si mati menguatkan anggapan perkahwinan yang sah antara Veeramah dan si mati. Selanjutnya, perlakuan defendan dalam membenarkan plaintif dan keluarganya untuk terus tinggal di rumah keluarga dan tindakan memindahkan harta-harta kepada plaintif adalah petunjuk kelakuan yang dijana oleh ikatan kekeluargaan (lihat perenggan 5(b)–(e)).

(3) Kuasa untuk membatalkan status keesahan plaintif dan realiti bahawa darah yang sama mengalir dalam tubuh plaintif dan defendan boleh dijalankan dalam kes-kes yang amat drastik. Kes ini bukanlah kes yang mana kuasa tersebut perlu dijalankan. Dengan itu, plaintif adalah anak si mati yang sah (lihat perenggan 7).

(4) Walaupun defendan menghujahkan bahawa si mati hanya mengalami strok kecil dan mempunyai kawalan penuh fakulti mindanya ketika melaksanakan wasiat tersebut, keterangan perubatan menunjukkan bahawa si mati telah pulih sedikit dan sangat lemah serta tidak keruan. Dalam hal keadaan sedemikian, adalah sukar untuk memahami bagaimana si mati boleh bertemu dengan peguamnya untuk menyediakan wasiat tersebut. Saksi-saksi pengakusaksian bagi wasiat tersebut juga tidak dipanggil untuk memberi keterangan (lihat perenggan 10).

A (5) Plaintif berjaya membangkitkan hal-hal keadaan mencurigakan yang menimbulkan keraguan tentang keupayaan si mati untuk berwasiat semasa dia melaksanakannya (lihat perenggan 11).]

Notes

B For a case on grant of probate, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2533.

Cases referred to

Chua Mui Nee v Palaniappan [1967] 1 MLJ 270, FC (refd)

C *Kaulsya a/p Pathmanathan & 1 other v Jamuna a/p Narayanan* Suit No 22NCVC-1084–11 of 2011 (unreported) (refd)

Lakshmi Ammal v Algiriswami Chettiar (unreported) (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

D *Letchumanan Chettiar v Palaniappa Chettiar* [1978] 1 MLJ 120, FC (refd)

Martha Samadhanam David v Sudha AIR 1950 Kant 26; AIR 1950 Mys 26, HC (refd)

Legislation referred to

E Civil Law Act 1956

Evidence Act 1950 ss 50, 112

Law Reform (Marriage and Divorce) Act 1976

Murali Achan (K Kulasekar Achan & Associate) for the plaintiff.

F *Jaspal Singh Mann (Pramjit Kaur and Santhakumari a/p Thangavelu with him) (Man & Associate) for the defendant.*

Prasad Abraham J:

G

[1] This case embarked on a challenge to a will propounded by the defendant, wherein pursuant to a Petition No 921 of 1978, a grant of probate was issued by the High Court in Kuala Lumpur on 28 November 1978, by the plaintiff. The defendant challenged the locus of the plaintiff to bring this action

H as the birth status of the plaintiff was illegitimate and the law of distribution did not recognise the plaintiff, and with that challenge, the court had to dwelve into the family history of the plaintiff and the defendant predating back to the 1940s to properly determine the status of the plaintiff.

I **[2]** The plaintiff contends that the plaintiff is the lawful son of the late Palaniappa Pillai s/o Periayah who was the Patriach of the family ('Palaniappa'). Palianappa came to this country from India in the 1940s and he lived in a house in Rawang Selangor at No 3 Lorong Kong Fatt ('the family home'). Palaniappa was reputed to have had four wives, two of whom lived and died in India. Now

Palaniappa lived in the family home with Veeramah and Sinnamal who were both sisters and had four children with Veeramah. They are Maniam, Sundarajoo, Ravinthran and the plaintiff. The defendant and his brother Subramaniam were children by his first wife Ramayee Ammal. All these siblings lived with the deceased, Veeramah and Sinnamal in the family home and to all and sundry they were a family.

[3] The defendant, contends on the other hand, that this was a pure arrangement of convenience as the deceased had a history of 'girlfriends' and the plaintiff and his siblings were never recognised nor accepted by the defendant as Veeramah had a thalli tied by one Veralingam and she had made a claim for his pension. In the light of that, there could not be a customary marriage between the plaintiff's mother and the deceased and it follows the plaintiff's status was one of illegitimacy.

[4] The court would have to charter unknown waters as all this took place in the 1940s well before the coming into force of the Civil Law Act 1956 and Law Reform (Marriage and Divorce) Act 1976, which recognises customary marriages.

[5] I refer to the late Augustine Paul's text on *Evidence Practise & Procedure* (4th Ed) at p 557 on words where the learned author sets out ss 50 and 112 of the Evidence Act 1950 and I quote:

50 Opinion on relationship when relevant

(1) when the Court has to form an opinion as to the relationship of one person to another, *the opinion expressed by conduct as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge on the subject is a relevant fact.*

(2) Such opinion shall not be sufficient to prove a marriage in prosecutions under section 494, 495 or 498 of the Penal Code.

ILLUSTRATIONS

(a) The question is whether A and B were married.

(b) *The question is whether A was a legitimate son of B. The fact that A was always treated as such by members of the family is relevant.*

Evidence of marriage

(a) The evidence of reputation of two persons being husband and wife is evidence of such marriage.

per Hackett J in *Ong Cheng Neo v Yeap Cheah* (1872) 1 Ky 326 , 328–330:

A It is admitted that the Plaintiff and the testatrix were children of the same mother, Cheah Tuan Neo, and the question at issue is whether Cheah Tuan Neo was married to Ong Sye, the father of the plaintiff, or whether she was only his concubine.

B The evidence in support of the marriage is of two kinds - first, the evidence of persons who state they were present at the marriage ceremony; *and secondly, evidence of reputation*. Upon the first point several aged Chinese were called, who stated that they were present at the marriage of Cheah Tuan Neo to Ong Sye, about sixty years ago, and that they were always regarded as husband and wife, and as such were received in society. Many other witnesses were called by the Plaintiff to prove C reputation and, indeed, all the witnesses as well as those for the defendant, as for the Plaintiff [with the exception of Khoo Seng Hap whose evidence was unsupported] concurred in saying that Cheah Tuan Neo was always treated with the respect due to a married woman, and was regarded as such. It also appeared in evidence that after the death of Cheah Tuan Neo, the Plaintiff applied for letters of administration to her estate, and that, upon the hearing of the petition, the testatrix as the eldest D daughter of the deceased, appeared, and herself applied for letters, but that she subsequently waived her claim in favour of the Plaintiff, thus implicitly acknowledging her legitimacy. The Plaintiff also proved that the testatrix had procured a tombstone from Chine for her mother's grave, on which were inscribed the words - 'Cheah Tuan Neo, her tombstone, son: Oh Kok Jean; daughters: Ong E Yeo Neo, Ong Urn Neo and Ong Cheng Neo', but there was no mention made of husband. It is stated that it is unusual to put the husband's 'seh' or tribe on the wife's tombstone, and the omission of it in the present case is accounted for as follows:

'Koh Teng Choon, the Chinese interpreter of the Supreme Court states that when a woman has one husband, the name of the husband is inscribed, but if she has F had two husbands, the name of the last husband is placed, if there is an agreement between the parties interested, but that if they do not agree, then the name of neither husband is placed. On the whole, I think, that if any inference is to be drawn from the inscription on the tombstone, it is favourable to the legitimacy of the plaintiff, as all the daughters are described in the same way, and no difference G whatever is made between them.

The defendants contended that the evidence of the marriage is insufficient, and they rely on the following circumstances: first, that it is not stated by the witnesses of the marriage that any male relative gave the woman away; secondly, that Cheah Tuan Neo was taken when dying from the house of plaintiff to that of Oh Yeo H Neo; and lastly, that at the funeral of Cheah Tuan Neo, the seh 'Oh' [that of the first husband] was inscribed on the lanterns.

Now, in deciding the question of marriage or no marriage, in a case where there is evidence that the parties have passed as man and wife for many years, it must be remembered that it does not merely depend on the greater or lesser weight of the I *evidence on one side, or on the other, or in the balance of evidence as to particular facts. In the case of marriage, there is always a presumption in its favour. Semper presumtor pro matrimonio. As Lord Lyndhurst observed in Morris v Davies [5 Clark & Fin 163], the presumption of law [in favour of marriage] is not to be lightly repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it, must be strong, distinct, satisfactory and conclusive.*

In the Breadalbane case, [LR ISc & Div 182] the connection of the persons whose marriage was in question was in its origin illicit, and yet the House of Lords held, that after many years cohabitation with the reputation of husband and wife, it must be presumed that they had been married, although, there was no evidence of an actual marriage. It is true, this was in Scotland, but there seems no reason why the same principle should not hold good, generally. As Lord Cranworth observed in that case: *'By the law of England, and I presume of all other Christian countries, when a man and woman have long lived together as husband and wife, and have been so treated by their friends and neighbours, there is a prima facie presumption that they really are, and have been what they profess to be.* If, after their deaths, a succession should open to their children any one claiming a share in such succession as a child, would establish a good prima facie case, by showing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child'.

In the present case we have the fact of the marriage proved by witnesses, and even if the evidence of the performance of the marriage ceremony be considered not altogether satisfactory, yet there is clear evidence that, after the death of her first husband, Cheah Tuan Neo, lived with Ong Sye as his wife, and was regarded as such by all her relations and friends. The only evidence to contradict the evidence of reputations, extending over a period of about sixty years, is that, of the witness Khoo Seng Hap, who alleges that the deceased Yeo Neo spoke to him in terms of disapproval of the connection of her mother with Ong Sye, and called it a shameful affair, but as this is unsupported and is inconsistent with all the other evidence in the case, I do not consider it as worthy of credit.

The presumption which arises from the evidence of reputation extending over so long a period of time, I do not think is rebutted by the facts relied upon by the Defendants. The evidence of the meaning and significance of Chinese customs, [such as carrying lanterns at a funeral] must be much clearer than it has been in the present case to warrant me in inferring from it the non existence of a previous marriage, in opposition to the strongest evidence from reputation. *When the status of marriage has subsisted for more than half a century, and children have been born who always held in the family, the position of legitimate members of that family, it appears to me, that it would be most dangerous to hold that status does not in reality exist, except on the clearest and strongest evidence. In the present case, I do not think such evidence has been produced,* and I, therefore, feel bound to hold, that the plaintiff has established her rights as one of the next of kin of the testatrix.

(See also *R v Govindasamy* [1993] 2 MLJ 97 (HC)

> This being a criminal case the marriage must be strictly proved and recourse cannot be had to the presumptions in favour of marriage which the court can rely upon in civil cases such as those in which the legitimacy of children is in issue. The distinction between the degree of proof of marriage required in a civil case and that required in a criminal prosecution is exemplified by s 50(2) of the Evidence Ordinance which provides that the opinion expressed by conduct of any person who has special means of knowledge as to the existence of any relationship of one person to another shall not be sufficient to prove a marriage in prosecutions under s 498 although such opinion is a relevant fact which might constitute sufficient evidence in a civil matter.

A On a criminal charge the actual celebration of a marriage ceremony must be proved unless the marriage can be established by a certificate of registration and if the ceremony is to be proved at least one witness must be recalled who can describe it so as to enable the court to determine whether it constituted a legal marriage, (see *Archbold's Criminal Pleadings and Evidence* (28th Ed), p 1327).

B

I also set out s 112 of the Evidence Act 1950 and I quote:

Section 112 Birth during marriage conclusive proof of legitimacy

The fact that any person was born during the continuance of a valid marriage C between his mother and any man, or within two hundred & eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

D Opinion evidence as to legitimacy

Section 112 of the Act deals with the presumption as to legitimacy. Illustration (b) *of this section states that when the question is whether A was the legitimate son of B, the fact that A was always treated as such by members of the family is relevant.*

E Per Mansfield CJ in the *Berkeley Peerage Case* (1811) 4 Camp 401, 416:

If the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.

Let me examine the evidence that is before the court.

F (a) although there is no clear direct evidence on any wedding ceremony, that Veeramah and the deceased went through, they had lived together for almost 40 and had four children together. The evidence points to them being regarded as husband and wife and have passed off as husband and wife for many years. The presumption of marriage is not to be easily G 'repelled'. The other point to be considered is that the siblings were all brought up in the family home and this included the defendant and his brother. I refer to the cross-examination of PW1 at pp 62–69 of the notes of evidence:

H Q: Question number 180 to 188 Yang Arif. Why do you say that the deceased treated you and your siblings as his lawful children? Question number 180.

A: Ever since my father, ever since I was born, he took care of me and I grew up with my father. He has acknowledged me in the birth I certificate, he has put his name in the birth certificate (01:52:12 inaudible). So I think it's a good reason to say that my father has treated me as a lawful child.

Q: So in fact you knew for a fact that you and your siblings were not his lawful children.

A: Disagree.

Q: You've stated that the deceased had treated you and your siblings as lawful children. Am I right?

A: Yes.

Q: Yes he did not hold on trust or transfer his property to you or your siblings during his lifetime. What do you have to say about this?

A: The fact that he did not make the trust or transfer doesn't make us unlawful children

Q: No. What do you have to say for that, that he did not actually transfer any properties to you or your siblings nor did he hold any property for trust?

A: That doesn't make us unlawful children. That's what I'm saying.

Q: Now I refer you to a photograph.

Counsel for defendant

There's two photographs. I will put it as A and B Yang Arif

Q: In Bundle B, in Tab-36 can you tell the Court, the second photograph, that is B, where is the deceased in the photograph?

A: Third from the back.

Court

Q: From the left?

A: Yes, from the left

Q: Yes. If he has treated you and your siblings as lawful children, yet during the eldest brother's marriage the deceased chose to stand behind with other relatives.

A: I think it's not necessary to stand beside my mother. And if you see the top photograph my mother and father.

Court

Q: Where's your mother in this photograph B?

A: My mother is just on the right of my brother Maniam. She is seated just beside Maniam. Maniam wearing the garland. She is on the right of Maniam.

Q: Now I refer you to the first photograph. According to Hindu customs, how do you get blessing from your parents?

A: Both of them will blessing.

Q: No, how do you get blessing?

A: Throw the rice.

Counsel for defendant

Below is English one. The card is both in Tamil and in English.

Q: Yang Arif I won't be asking any question on that. Now my question on these photographs. Are you telling the Court since the deceased was standing there in the photograph and you claim he was blessing, that therefore you become his lawful son and that you have a right of succession of his property? Are you saying that?

A: What I'm saying that they are blessing my brother's wedding, they are obviously my mother and father.

Q: Do you agree that there are others who are also blessing your brother?

A: It's not the photograph

Q: No, do you agree during the marriage that there are others who are blessing your brother?

A: Yes

Counsel for defendant

Yes, question number 176 until 179. Refer to Tab-31 Bundle B

Q: Bundle B, Yang Arif the transfer form. Can you tell the Court the consideration given by you to the defendant for the transfer of these properties?

A: No consideration

Court

Q: Consideration was kasih sayang?

A: Yes

Q: Kasih sayang between who and who? Between brothers or?

A: Even though it says love and affection, this was given

Q: No just answer me that. Love and affection based on what? Relationship of?

A: Brother

Q: Brothers?

A: Yes

(b) I also took into account the birth certificate of the plaintiff, which clearly cites the deceased as the father, (bundle B1, p 1);

(c) Veeramah the plaintiff's mother participated in the funeral rites of the deceased when he passed away on 22 October 1977;

(d) when the plaintiff's brother was married, the wedding invitation was issued in the name of Veeramah and the deceased (see bundle B1 Tab 12). All these evidences in my view clearly support the presumption of a valid marriage between Veeramah and the deceased; and

(e) the conduct of the defendant in allowing the plaintiff and the family to continue to reside in the family home and the defendant had actually transferred property to the plaintiff is surely indicative of conduct moved by family ties. The court observes that the defendant was coy in giving direct answers as to transfer of properties to the plaintiff.

[6] The defendant had raised the point that as the deceased had married and had a wife in India in 1942, when he began to cohabit with Veeramah and therefore, no marriage could be contracted in law as Hindu customary law does not recognise a polygamous marriage and I was referred to the authority cited by counsel for the defendant namely *Kaulsya a/p Pathmanathan & 1 other v Jamuna a/p Narayanan* Suit No 22NCVC-1084–11 of 2011 (the defendant's bundle of authorities II) and counsel for the plaintiff cites the following authorities to rebut the contention of the defendant, *Martha Samadhanam David v Sudha* AIR 1950 Kant 26; AIR 1950 Mys 26 at Tab 2 of the plaintiff's bundle of authorities vol II (PBA II), *Lakshmi Ammal v Algiriswami Chettiar* at Tab 3 of PBAII, and *Letchumanan Chettiar v Palaniappa Chettiar* [1978] 1 MLJ 120 at Tab 5 ie apart from the provisions of the Evidence Act 1950, which I had alluded to, I refer to the decision at the Federal Court in case *Chua Mui Nee v Palaniappan* [1967] 1 MLJ 270, and to the judgment of His Lordship Barakbah LP at p 272 and I quote:

> In the present case, as I have said earlier, the question is not whether there had been *justae nuptiae justum matrimonium* but whether there had been a marriage. At the time the marriage was celebrated between the deceased and the appellant, Hindu law and custom permitted polygamous marriages in India but then the question arose as to whether the consent of the first wife must be obtained before the second marriage could take place. According to *Gupta's Hindu Law* (2nd Ed), p 900:
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> > It has been held that a Hindu may marry again though he has a wife or wives living without his wife's consent and although no justification, such as the sterility of the wife, exists, unless custom prevents such marriage without such consent. In such a case her consent must be obtained and other conditions if any required must be fulfilled.

[7] I might add as a postscript to this point, the power to remove in law the status of legitimacy of the plaintiff and the reality that the same blood runs through the veins of the plaintiff and the defendant should be exercised only in the most drastic of cases. This is certainly not one of them. I therefore rule the plaintiff is the legitimate son of the deceased.

[8] I now turn to the question of the validity of the will allegedly executed by the deceased. The alleged last will and testament of the deceased is found in Annexure 26, bundle B ie the said will. The plaintiff contends that the said will could not have been executed by the deceased as he was seriously ill at the material time, and the veracity of the will is challenged. I quote the holding of the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 98 where it was held:

> (1) Where the validity of a will was challenged, the burden of proving testamentary capacity and due execution is on the propounder of the will as is the burden of dispelling any suspicious circumstances that may surround the making of the will. That burden may be discharged by showing that the testator, being of competent mind, had his will read over to him or that the testator knew and approved of the contents of the will. The onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay on those who challenged the will, in this case, the plaintiffs (see pp 113G, 116B).

[9] I now embark to evaluate the evidence before the court before the said will was executed to ascertain whether the deceased had testamentary capacity to execute the said will.

[10] The defendant contends that the deceased albeit had suffered a minor stroke at the time but was in full control of his mental faculties and understood fully what he was signing. However, the medical evidence suggests otherwise. I refer to tab 22–24 of bundle B. These reports show the deceased had made little recovery and was very weak and incoherent under these circumstances. I find it hard to comprehend how the deceased in that condition could have visited the lawyer's office to prepare the said will. None of the attesting witnesses to the said will were called to testify and neither was Subramaniam the brother of the defendant who purportedly accompanied the deceased to the lawyer's office although my attention was drawn to the fact that he was present in court throughout proceedings. The plaintiff's counsel also points to the fact that tab 25 of bundle B shows a power of attorney purportedly signed by the deceased and two weeks later, the deceased thumbprints his alleged signature to the said will once again the solicitor who attested the power of attorney were not called to testify.

[11] It is my judgment that the plaintiff has succeeded in raising several suspicious circumstances that cast doubt on the testamentary capacity of the deceased when he executed the said will. If the said will stands, then defendant is a sole beneficiary to the plantation to the exclusion of all his siblings, whereas if the estate of the deceased was to be administered, then all siblings would be entitled to their share of the deceased's estate according to the law.

[12] For the aforesaid reasons, I made the following orders:

(a) OIT of para 34(a)–(c) only; and

(b) the counterclaim of the defendant is dismissed with no order as to costs.

Order made in favour of plaintiff and defendant's counterclaim dismissed with no order as to costs.

Reported by Kohila Nesan